"Don't Risk Homicide: Abortion After 10 Weeks Gestation"

(Forthcoming in *The Journal of Medicine and Philosophy*)

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Abstract: When an abortion is performed, someone dies. Are we killing an innocent human person? Widespread disagreement exists. However, it's not necessary to establish personhood in order to establish the wrongness of abortion: a substantial chance of personhood is enough. We defend *The Don't Risk Homicide Argument*: abortions are wrong after 10 weeks gestation because they substantially and unjustifiably risk homicide, the unjust killing of an innocent person. Why 10 weeks? Because the cumulative evidence establishes a substantial chance (a more than 1 in 5 chance) that preborn humans are persons around this stage of development. We submit evidence from our bad track record, widespread disagreement about personhood (after 10 weeks gestation), problems with theories of personhood, the similarity between preborn humans and newborn babies, gestational age miscalculations, and the common intuitive responses of women to their pregnancies and miscarriages. Our argument is cogent because it bypasses the stalemate over preborn personhood and rests on common ground rather than contentious metaphysics. It also strongly suggests that society must do more to protect preborn humans. We discuss its practical implications for fetal pain relief, social policy, and abortion law.

Keywords: abortion, moral risk, moral personhood, ethics of uncertainty, fetal pain.

I. INTRODUCTION: MOTIVATING CASES

When a drone pilot presses a button, someone dies. Consider a situation faced by pilot Brandon Bryant, whose U. S. Predator drone in 2007 was circling high in the sky above Afghanistan:

> [Bryant] was paired with a pilot he didn't much like, instructed to monitor a compound that intel told them contained a high-value individual….nobody briefed him on the specifics. It was a typical Afghan mud-brick home, goats and cows milling around a central courtyard. They watched a corner of the compound's main building, bored senseless for hours. They assumed the target was asleep.
>
> Then the quiet ended. "We get this word that we're gonna fire," he says. "We're gonna shoot and collapse the building. They've gotten intel that the guy is inside." The

> drone crew received no further information, no details of who the target was or why he needed a Hellfire dropped on his roof.
>
> Bryant's laser hovered on the corner of the building. *"Missile off the rail."* Nothing moved inside the compound but the eerily glowing cows and goats. Bryant zoned out at the pixels. Then, about six seconds before impact, he saw a hurried movement in the compound. "This figure runs around the corner, the outside, toward the front of the building. And it looked like a little kid to me. Like a little human person."
>
> Bryant stared at the screen, frozen. "There's this giant flash, and all of a sudden there's no person there." He looked over at the pilot and asked, "Did that look like a child to you?" They typed a chat message to their screener, an intelligence observer who was watching the shot from "somewhere in the world"—maybe Bagram, maybe the Pentagon, Bryant had no idea—asking if a child had just run directly into the path of their shot.
>
> "And he says, 'Per the review, it's a dog.' "….
>
> If they'd had a few more seconds' warning, they could have aborted the shot, guided it by laser away from the compound…The pilot "was the type of guy to not argue with command," says Bryant. So the pilot's after-action report stated that the building had been destroyed, the high-value target eliminated. The report made no mention of a dog or any other living thing. The child, if there had been a child, was an infrared ghost (Power 2013).

The drone pilots looked at their monitor and saw infrared images of a small unidentified organism wandering into the kill zone. Is it a dog or a little child? What if it was probably a dog but unclear given the evidence? What if the pilots still had time to divert the missile? Then it would be wrong for them not to do so, unless something of staggering importance was at stake. For it is wrong to substantially risk the unjust killing of an innocent child, unless we have strong overriding reason to do so.

What might such overriding reasons be? Suppose the pilots would suffer a considerable personal cost if they don't take the risk. For instance, suppose that despite the ambiguous figure the chain of command orders them to stay the course and destroy the compound. The pilots protest ("But it could be a child!") but then are credibly threatened with the loss of their military career for violating a direct order. They know the loss of their careers would burden them financially and psychologically (they have children to support) and frustrate their life goals. Now they face a choice: should they substantially risk killing an innocent child to avoid losing their careers? It strongly seems not. Such personal costs to them, though considerable, would not morally justify gambling with an innocent child's life.

What if the stakes were higher? Suppose the pilots are not only credibly threatened with the loss of their careers but also with legal prosecution and six months in military prison for violating a direct military order (*Manual for Courts Martial: United States* 2019). Such threats to drone pilots are known to happen

(Powell 2013). Is it permissible for them to substantially risk a child's life to spare themselves such a cost? It seems not. If they take the risk and afterwards discover a little girl's dead body in the rubble, her blood would cry out.

It would be wrong for the drone pilots to take the risk even if they cannot verify afterwards who or what they have killed (because the Hellfire missile would incinerate the victim's body). It would be wrong even if afterwards they review the carnage and discover they actually killed a dog, not a child. For it's wrong to substantially and unjustifiably risk homicide, even if one gets lucky and doesn't actually commit homicide. For example, it's wrong to drive drunk even if you get lucky and don't kill anyone.

We apply similar moral reasoning in domains outside of warfare, such as driving, hunting, and demolition. For example, if you are a demolition expert called in to detonate a building where street children sometimes play and you hear the movement of a living organism inside the building, you should not proceed even if the evidence warrants the conclusion that it *probably* is only a rat. If your impatient boss, with deadlines to meet, seriously threatens to fire you unless you proceed, this seems to be a personal cost you must accept in order to avoid substantially risking a child's life. This commonsense moral reasoning motivates an argument against abortion that we develop in this paper.

When an abortion is performed, someone dies. We look at the monitor and see ultrasound images of a small unidentified organism moving around in the womb. Is it a little child? Are we killing an innocent human person? Widespread disagreement exists. However, it's not necessary to establish personhood in order to establish the wrongness of abortion: a substantial chance of personhood is enough. We defend *The Don't Risk Homicide Argument*: abortions are wrong after 10 weeks gestation because they substantially and unjustifiably risk homicide, the unjust killing of an innocent person. Why 10 weeks? Because the cumulative evidence establishes a substantial chance (a more than 1 in 5 chance) that preborn humans are persons around this stage of development. We submit evidence from our bad track record, widespread disagreement about personhood (after 10 weeks gestation), problems with theories of personhood, the similarity between preborn humans and newborn babies, gestational age miscalculations, and the common intuitive responses of women to their pregnancies and miscarriages. Our argument is cogent because it bypasses the stalemate

over preborn personhood and rests on common ground rather than contentious metaphysics. It also strongly suggests that society must do more to protect preborn humans. We discuss its practical implications for fetal pain relief, social policy, and abortion law.

Let us outline the paper. In this section, we introduced motivating cases. In section II, we explain *The Don't Risk Homicide Argument* and situate it in the abortion literature. In sections III and IV, we support the argument. In section III, we argue that we should not substantially risk homicide and that there is no overriding reason to do so in abortions after 10 weeks gestation (in cases where the mother's life is not threatened). We also discuss The Good Samaritan Argument. In section IV, we submit cumulative evidence showing that there is a substantial chance (a more than 1 in 5 chance) that preborn humans are persons around 10 weeks gestation. In the final section, we explain why our argument is cogent and makes progress in the abortion debate. We also discuss its practical implications for fetal pain relief, social policy, and abortion law.

II. THE DON'T RISK HOMICIDE ARGUMENT

The Don't Risk Homicide Argument

(1) *A Substantial Chance of Personhood*: There is a substantial chance that preborn humans after 10 weeks gestation are innocent persons with a serious right to life.
(2) If they are in fact innocent persons, then killing them in abortion is an act of homicide (when the mother's life is not threatened).
(3) Thus, there is a substantial chance that an abortion after 10 weeks gestation is an act of homicide (when the mother's life is not threatened). [From 1 and 2]
(4) *Don't Risk Homicide*: When there is a substantial chance that doing something would be an act of homicide, it would be morally wrong to do it, unless there is overriding reason to take this risk.
(5) There is no overriding reason to substantially risk homicide by performing or having an abortion after 10 weeks gestation (when the mother's life is not threatened).
(6) Thus, it is morally wrong to perform or have an abortion after 10 weeks gestation (when the mother's life is not threatened). [From 3, 4, and 5]

Let us explain the argument. Let *abortion* refer to the deliberate act of killing a *preborn human*, a living individual member of the human species who is developing inside the mother's womb. Let abortions *after 10 weeks gestation* refer as it standardly does (in medicine and law) to abortions 10 weeks after the estimated first day of the woman's last menstrual period. The mother's life is not threatened in the overwhelming majority (99%) of such abortions. Women seek second trimester abortions for broadly the same reasons they seek

first trimester abortions—not because their life is threatened but because "having a baby would dramatically change my life," "I can't afford a baby now," and "I don't want to be a single mother or am having relationship problems" (Finer et al. 2005; Finer et al. 2006; Foster and Kimport 2013).

Worldwide around 20% of abortions are performed after 10 weeks gestation. More than ten million such abortions are performed each year, including 150,000+ each year in the United States (Lohr, Hayes, and Gemzell-Danielsson 2008; Bearak et al. 2020; Kortsmit et al. 2020). This is a widespread practice, and much is at stake.

Let *persons* refer to individuals like us who possess *moral personhood,* i.e. a high and equal moral worth or moral status that implies a stringent moral presumption against killing us, torturing us, and so on. This presumption is commonly understood in terms of moral rights and duties: we persons have a *serious right to life*, which implies that others have a stringent moral duty to not kill us. This right can possibly be overridden or defeated by other weighty moral considerations but only in exceptional cases and not easily so. For example, you cannot intentionally kill an innocent person simply to prevent bad consequences from happening to yourself or another person. Suppose you are rushing to the hospital to save your almost severed limb and you encounter an injured child blocking your only driving path. Can you intentionally run over the child if necessary to save your limb? It strongly seems not.

Let *homicide* refer to the act of unjustly killing another human person, i.e. violating their serious moral right to life. This is homicide in the moral sense rather than legal sense. Homicide is distinguished from murder in both ethics and law.[1] Unlike the narrower category of murder, the broader category of homicide does not require the intent to kill another person nor does it entail a high level of culpability. Homicide can instead be the result of less culpable reckless or negligent behavior, where an individual does not intend to kill an innocent person but does something that substantially and unjustifiably risks doing so. Intentions matter: reckless drivers and negligent drunk drivers who risk killing innocent persons are not as culpable as those who intentionally attempt to run them down with their vehicle. The voluntariness of the act also matters to culpability. For example, when a mother kills her newborn her culpability is usually mitigated by internal factors (e.g. postpartum depression) or external factors that impaired her deliberation

and led to the homicide. In contrast, when a stranger kills a newborn, the act is treated as murder. Our argument addresses the moral *wrongness* of the *act* of abortion, not the more difficult question of the moral *culpability* of the *agent*: the fact that having an abortion wrongfully risks homicide does not entail that the risk taker is highly culpable. This distinction is important because most women seeking abortions do not intend to kill an innocent person (e.g. because they do not think the preborn human *is* an innocent person) and are subject to internal factors (e.g. fear) and external factors (e.g. pressure from other people) that substantially mitigate their culpability for wrongfully risking homicide. These women deserve empathy, and our argument does not judge them.

Let a *substantial chance* of personhood and homicide refer to a chance that is substantial even if it not probable or middling on an absolute scale. To put a number on it, let a substantial chance refer to *a more than 1 in 5 chance* (or probability higher than 0.2).

Since our argument deals with chances, what sort of probability do we have in mind? Theorists routinely distinguish between subjective probability and evidential probability (Weirich 2020). *Subjective probability* is all in your head: it is level of confidence that you have in the truth of a proposition. For instance, some are supremely confident that preborn humans are not persons. But we all know that our subjective confidence may not be warranted by the evidence available. *Evidential probabilit*y in contrast is an objective notion that is sensitive to the evidence: it is the level of confidence in a proposition that would be warranted or justified by a body of evidence, such as the evidence available. For instance, given the evidence available, you should not be supremely confident that you won't kill anyone if you drive drunk. If you happen to be supremely confident and drive drunk, your subjective confidence would not get you off the moral hook. As the example indicates, evidential probabilities can be compelling and can have action-guiding moral implications, even if we cannot precisely quantify them.

Our argument deals with evidential probabilities. Premise (1)—*A Substantial Chance of Personhood*—claims that given the evidence publicly available there is a substantial chance (a more than 1 in 5 chance) that preborn humans are persons after 10 weeks gestation. We make no attempt to precisely quantify this

chance: such artificial precision eludes human beings who can seldom do more than roughly estimate the degree of support provided by the evidence.

Finally, we should situate our argument in the abortion literature. First, this is no argument from potential. Arguments from potential invoke some *future* characteristic of preborn humans as justification for not killing them now in abortion. In contrast, our argument invokes the substantial chance that preborn humans (older than 10 weeks gestation) are persons now.

Second, our argument differs from traditional uncertainty arguments (or precautionary arguments) against abortion, which maintain that if it is uncertain whether preborn humans (including human embryos) are persons, then we should err on the side of caution and not kill them in abortion. For instance, Christopher Kaczor: "if weighty questions remain about the personhood of the human embryo, it would be unjust to kill such a being precisely because serious doubts arise about the status of this being" (2014, 143). Arguments of this sort are not new (Tauer 1984) but are almost never developed in detail. For instance, Kaczor (2014, 143-144) and Beckwith (2007, 150-152) devote only a few pages to their uncertainty arguments. As Friberg-Fernros observes, uncertainty arguments are offered as a quick "back-up arguments" just in case other arguments against abortion don't work (2017, 11).

Uncertainty arguments need development. The underlying moral principle involves an evidential situation and a stringent precautionary obligation: "if there is a chance that an individual *S* is a person and that killing *S* would be unjust, then we should not kill *S*." The evidential bar is rarely specified: how big of a chance warrants stringent precaution? If the smallest chance of personhood suffices, then it would be wrong to farm and kill animals for food, organ harvesting, and scientific research, even in the most humane conditions, given the nonzero chance that animals are persons like us (cf. Boonin 2003, 314-35). To avoid such problematic implications, the chance of personhood must be substantial or reasonable. But how big of a chance is *that*? Proponents usually don't tell us. Since the evidential bar is left ambiguous, it is unclear whether preborn humans meet it and thus whether the uncertainty argument succeeds. When the evidential bar is specified it is usually set too low or needlessly high. For instance, Francis Beckwith suggests that even if there is only a 1 out of 100 chance that doing something would unjustly kill an innocent person, we

must refrain from doing it, even at great cost to ourselves (Beckwith 2007, 151). But this sets the evidential bar too low (cf. Stretton 2008, 794). In contrast, our argument specifies the evidential bar in a way that is cogent and dialectically effective.

Uncertainty arguments also neglect the stringency of the precautionary obligation. Could the substantial costs of unwanted pregnancy override the precautionary obligation? What if the woman's life is threatened? The overriding conditions receive no sustained attention.[2] As a result, the scope of the argument's conclusion is left unclear: when should we refrain from abortion? In contrast, we argue in section III that the stringent precautionary obligation is overridden only in cases where the mother's life is threatened.

Uncertainty arguments against abortion not only need development but face three dialectical problems. First, the personhood of human embryos (or early human embryos) strikes some as absurd, not uncertain (Greasley 2017). Second, the standard arguments for their personhood are not widely persuasive. Proponents offer arguments for personhood-from-conception or the future-like-ours argument but these arguments invariably rest on contentious premises regarding our metaphysical nature and personal identity over time (Moller 2011; Friberg-Fernros 2017; Napier 2019). Third, some uncertainty arguments rely on contentious and unnecessary theoretical machinery, such as particular ethical theories, decision theories (e.g. expected utility theory), or principles of rational decision-making (Maitzen 1999; Lockhart 2000; Boonin 2003, 310-324).

In contrast, our argument avoids the dialectical problems facing other arguments because its scope includes only preborn humans older than 10 weeks gestation (not human embryos), our evidence for their personhood does not rest on contentious metaphysical premises, and our argument relies on intuitive moral principles rather than contentious and unnecessary theoretical machinery.

A natural question: why 10 weeks gestation rather than sooner or later? Because the cumulative evidence establishes a substantial chance (a more than 1 in 5 chance) that preborn humans are persons around this stage of development, as we shall see.

III. THE PREMISES

We must support *The Don't Risk Homicide Argument*.

Premise (1)—*A Substantial Chance of Personhood*—is the main premise, which we support extensively in the next section. For now, consider support for the other premises.

Premise (2) is reasonable. Of course, some philosophers deny it. For instance, Thomson (1971) and a few others have developed The Good Samaritan Argument which purports to show through analogies (e.g. the famous violinist case) that even if there is a 100% chance that preborn humans are persons abortions still don't unjustly kill them or violate their right to life. However, there is widespread doubt about the cogency of their argument and analogies (Tooley 1983; McMahan 2003; Greasley 2017). David Boonin observes "what seems to be a widespread feeling: that while the good Samaritan argument is surely 'ingenious'…it is just as surely flawed" (2003, p. 134). The main flaw observed by commentators is that the analogies provided (e.g. the violinist case and the organ donation case) are just not good analogies to abortion. For instance, consider the killing difference: disconnecting from the violinist or refusing to donate an organ are acts of refusing to save or allowing to die, whereas abortions involve the deliberate killing of an (*ex hypothesi*) innocent person (Brody 1975, 175). Defenders have responded by trying to repair Thomson's argument (Boonin 2003, Chapter 4), but their attempts do not inspire confidence (Greasley 2017, Chapter 2). Rather than contribute to an already developed literature, we presume that The Good Samaritan Argument is flawed.[3] We also presume with most commentators that when the mother's life is not threatened abortion cannot be morally justified on the grounds of self-defense or defense of others (Greasley 2017, Chapter 3). Thus, we presume that if preborn humans after 10 weeks are in fact innocent persons, then killing them in abortion violates their right to life or is an act of homicide (when the mother's life is not threatened).

Premise (3) follows from (1) and (2). There is a substantial chance that an abortion after 10 weeks is an act of homicide because there is a substantial chance that the preborn human is a person and their personhood would entail that killing them in abortion is an act of homicide (when the mother's life is not threatened).

Premise (4)—*Don't Risk Homicide*—is as compelling a moral principle as any in ethics. It says that our evidential situation has implications for what we morally ought to do. When the chance that doing something would commit homicide is greater than a 1 in 5 chance, we have a stringent moral obligation to refrain from taking such a risk. For instance, we have a stringent moral obligation to refrain from playing a one-sided round of Russian Roulette with a five-shot revolver. This is not to deny the moral relevance of lesser chances (e.g. playing Russian Roulette with a six-shot revolver), nor is it to deny the fact that some chances are miniscule enough to be ignored, such as the chance that a small child is hiding behind my back tire when I back out of my drive way. Rather, it is simply to observe that even if the chance is not absolutely probable or even middling, a substantial chance of homicide is serious enough to require strong overriding reason to take it. And the higher the risk of homicide the stronger the reason needed to take it.[4]

Premise (5) claims that we don't have overriding reason to substantially risk homicide by performing or having an abortion after 10 weeks (when the mother's life is not threatened). What might such overriding reasons be?

First, consider the *lesser risk justification*: it is permissible to substantially risk homicide if doing so is necessary to avoid an even greater moral risk. For instance, return to our opening drone case. Suppose the drone pilots know that the high-value target in the compound is a terrorist who has armed himself with explosives, videotaped his last statement, and is clearly an imminent threat to many innocent people as he prepares to head out into surrounding civilian neighborhoods to carry out a massacre (for a depiction of such a scenario, see the British film *Eye in the Sky* 2016). When they fire the missile upon the terrorist's compound and then see that ambiguous figure wander into the kill zone, should they divert the missile? It seems not in this case, given what else is at stake. Both choices involve a grave moral risk, so what should the pilots do? Given the forced choice, they should take the lesser risk. And the lesser risk in this case appears to be the risk of (nonintentionally) killing one innocent child.

However, no lesser risk justification is available in abortion because the greater moral risk falls on the side of having or performing an abortion rather than refraining.

Consider the woman's decision-making. A woman's choice to refrain from abortion is morally safe: it is permissible for her to carry her pregnancy and give birth (Lockhart 2000, 51). She may face an overall cost to herself, but she risks doing no injustice to anybody by carrying her pregnancy (at least as long as her life is not threatened). The risk of wrongdoing clearly falls on the side of having an abortion.

Consider the decision-making of abortion providers. It could be argued that by refraining from abortions after 10 weeks they risk violating the reproductive rights of their patients by limiting their medical options. But even so we must compare the moral risks: which one is greater? The risk of unjustly killing an innocent person outweighs the risk of unjustly restricting the reproductive liberty of another person. This is so for two reasons. First, violating a person's right to life is worse than violating a person's right to reproductive liberty. For killing a person deprives her of life and all liberty, not just reproductive liberty. Second, reproductive liberty comes in degrees and thus violations of it do too. Any violation of the pregnant woman's reproductive liberty would be moderate rather than severe, for she could still acquire an abortion from her provider *before* 10 weeks gestation.

Second, consider the *staggering cost justification*: it is permissible to substantially risk homicide if doing so is necessary for you to avoid a staggering personal cost to yourself. Suppose that you are facing a medical emergency that imminently threatens your life and the only way to reach the hospital in time is to speed like a demon and drive recklessly through stop signs, thus substantially risking homicide. Can you permissibly do so? If your risk of committing (nonintentional) homicide is low though substantial and the risk of your own impending death is higher, then it might be permissible for you to take such a risk.

But suppose your life is not threatened. Suppose that you are running late for an important work meeting or for an airplane flight and that your career hangs in the balance. Can you permissibly speed like a demon and drive recklessly through stop signs, thus substantially risking homicide? It strongly seems not. The verdict is clear even if losing your career would heavily burden you financially and psychologically and frustrate your life goals.

Also consider our opening drone case. What if for diverting the missile and violating a direct military order the drone pilots are credibly threatened not only with the loss of their careers but with legal

prosecution and a sentence of six months of confinement in military prison? Is it permissible for them to substantially risk a child's life to avoid such a considerable cost to themselves? It seems not.

Such cases motivate the point that we cannot substantially risk homicide even to avoid a considerable cost to ourselves. The exception seems to be a case where the personal cost is truly staggering, like probable death. Can we substantially risk homicide to prevent our own death? The driving case suggests so.

Is the *staggering cost justification* available in standard pregnancy situations where the woman's life is not threatened? We must consider the personal cost faced by the woman and abortion provider.

Consider the abortion provider's decision-making. He could face a financial cost for not performing abortions after 10 weeks gestation but surely money would not justify seriously gambling with an innocent child's life.

Consider the woman's decision-making. Could the costs of unwanted pregnancy make it permissible for her to substantially risk homicide? It depends on the gravity and likelihood of the costs, given the evidence available. It also depends on the costs for the woman of *having* an abortion. After all, choosing pregnancy and choosing abortion both involve risks for the woman. So what matters is the expected *net cost* of choosing to carry an unwanted pregnancy and whether that net cost is staggering enough to justify substantially risking homicide.

The costs of choosing to carry an unwanted pregnancy include the physical and mental burdens of unwanted pregnancy and birth, financial costs, social costs, and the frustration of the woman's life plans to some extent. How severe and extensive will such costs be? Though the cost question is empirically tractable to some extent, the costs are hard to predict and vary from case to case. We should also factor in the potential benefits to women of choosing to continue their pregnancy. For instance, some women carry their initially unwanted pregnancy, give birth, and find themselves blessed with a loving relationship with their child. Such beneficial outcomes are not uncommon and should be factored into the overall cost-benefit estimation. For example, consider the recent *Turnaway Study*, which was the first longitudinal study to follow women who were denied abortions because of state law or abortion facility policy. Researchers found

that women denied abortions did not experience substantial or lasting negative mental health consequences. One week after being denied an abortion, 59% still wished they could have had an abortion. This dropped dramatically to 11% after the baby's birth and dropped further to 4% five years later (Rocca et al. 2021). The director of the study Diane Foster concluded: "Women are resilient" (Foster 2020, 128).

The costs of having an abortion are also uncertain and include short-term or lasting physical complications from the abortion procedure and various psychological costs stemming from the abortion. These costs can be substantial and physical complications are more likely at higher gestations (Grossman, Blanchard, and Bluemthal 2008). However, most women don't experience physical complications and those who experience psychological costs do so to different degrees that are difficult to measure and track. Thus, the expected net cost of unwanted pregnancy is hard to estimate, given the available evidence.

Overall cost estimation and cost comparison are difficult and often contentious matters. However, suppose for argument's sake that choosing abortion involves no cost or risk whatsoever for the woman. That is, suppose that the only expected costs fall on the side of carrying the unwanted pregnancy. Would such a favorable cost estimation morally justify abortions after 10 weeks? It appears not because, as we have seen, it's not permissible to substantially risk homicide unless the cost to ourselves is truly staggering.

Consider two reasons for thinking that the costs of unwanted pregnancy do not approximate a staggering cost like our own death. First, many of the costs of unwanted pregnancy can be alleviated to some extent and are temporary and not total: the burdens of pregnancy itself (at 10 weeks gestation) will last only six more months, other people can care for the child after birth, and the woman still has opportunity to recover and flourish afterwards, as many women do after their initially unwanted pregnancies. In contrast, the staggering cost of death is irreversible, permanent, and total. When we die, we lose everything. Second, another indication of which cost is worse is that if we had to choose for ourselves or our loved ones which cost to suffer, we would surely choose the costs involved in unwanted pregnancy rather than death (Maitzen 1999, 381).

We have argued that if there is a substantial chance that preborn humans after 10 weeks gestation are innocent persons, then we should not kill them in abortion, for doing so substantially and unjustifiably

risks homicide (when the mother's life is not threatened). Next we consider whether there is a substantial chance of personhood.

IV. A SUBSTANTIAL CHANCE OF PERSONHOOD

The cumulative evidence establishes a substantial chance (a more than 1 in 5 chance) that preborn humans are persons after 10 weeks gestation. Consider the following six sources of evidence.

4.1 *Bad Track Record*

Confident deniers of personhood after 10 weeks gestation should lessen their confidence given the bad track record we humans have of judging and treating vulnerable human persons as nonpersons. Consider for a moment the countless number of human persons that have been dehumanized and deemed nonpersons: ethnic and racial minorities, religious minorities, political dissenters, disabled people, the mentally ill, criminals, prisoners of war, homosexuals, women, children, orphans, infants, and the list goes on. Such vulnerable populations have been subject to such harms as slavery, unjust imprisonment, exploitation, sexual abuse, forced experimentation, segregation, denial of civil and political rights, discrimination in resource allocation, and homicide (e.g. infanticide, involuntary euthanasia, genocide). For instance, consider the current widespread practice of female infanticide in China, India, and other regions of the world. Or consider the Nazi T4 euthanasia program: hundreds of thousands of disabled victims were lethally injected or gassed with poison because they were deemed "unworthy of life." The list of documented atrocities could go on and on. Historical and present human behavior indicates that when we judge other vulnerable humans to be nonpersons and harm them (e.g. kill them), we often enough tend to make a horrible mistake, especially when we as individuals or as a society have something to gain by doing so. Our bad track record should humble us (Greasley and Kaczor 2018, 131-133).

Our bad track record is also no accident or quirk of human psychology. Our pernicious tendency to dehumanize vulnerable persons is psychologically ingrained to some extent and is also reflected in how we treat nonhuman animals (Smith 2020). Who are we dehumanizing and unjustly excluding now? Preborn humans are vulnerable and defenseless humans who are largely hidden from public view. We have something to gain by denying their personhood and apparently nothing to lose (since we are too old to be

aborted ourselves). Our bad track record and psychological biases (e.g. self-interest bias and dehumanization bias) should lessen our confidence in the judgment that preborn humans are nonpersons and can be permissibly killed to advance our own interests.

4.2 *Widespread Disagreement*

Widespread disagreement about personhood (after 10 weeks gestation) should also lessen our confidence:

The Argument from Widespread Disagreement

(7) We find widespread disagreement in society and among the relevant experts regarding whether preborn humans after 10 weeks gestation are persons.
(8) When we find widespread disagreement in society and among the relevant experts whether *p* is true, then we who are highly confident about *p* should become less confident.
(9) Thus, we who are highly confident that preborn humans after 10 weeks are not persons should become less confident.

Let *widespread* disagreement refer to disagreement between a large number of people where the distribution of opinion falls roughly between a 40/60 and 60/40 split. Let the *relevant experts* refer to those best positioned (epistemically) to determine preborn personhood, such as those who are familiar with the relevant evidence, have thought long and hard about the matter, and are relatively skillful in analysis, truth-seeking, morally sensitive, and so on. Our argument is not that widespread disagreement should lead us to drop our belief or suspend judgment but rather that we who are highly confident should *lessen* our confidence.

Does such widespread disagreement exist? Consider the scholarly, legal, and sociological evidence.

First, consider the scholarly literature on abortion and fetal personhood over the past fifty years. This extensive literature supplies evidence of intractable disagreement among scholars from scientific, medical, and humanist disciplines who are familiar with the relevant evidence, have thought long and hard about the matter, and are skillful in analysis, truth-seeking, morally sensitive, and so on. It is not very plausible to suppose that one group as a whole is much more credentialed (e.g. more informed and rational) than the other group as a whole. Rather, the groups appear to be peer groups. If there is such a thing as relevant expertise regarding preborn personhood, there appears to be widespread disagreement among the

relevant experts. If there is no such thing as relevant expertise—if we are all amateurs—then widespread disagreement among us should still lessen our confidence.

Second, consider the legal evidence. Most countries heavily restrict abortion in the second trimester. For instance, in most European Union countries the legal limit for most abortions is 12 weeks or lower (Popinchalk and Sedgh 2019). Boland (2010) reviewed abortion law in 191 countries and found that laws generally distinguish between first trimester and second trimester abortions. Whereas 30% of countries permit abortion on demand in the first trimester, only 5% of countries permit abortion on demand in the second trimester. Whereas 99% of countries allow abortion to preserve the mother's life, only 59% of countries allow abortion in the second trimester to preserve the mother's health (with varying definitions of "health"). Only 25% of countries allow second trimester abortions for pregnancies resulting from a sex offence (rape). Only 17% allow second trimester abortions for socioeconomic reasons (Boland 2010). We could also consider laws criminalizing fetal homicide (the killing of preborn humans in violent acts against their mother).

Third, consider the sociological evidence of public polling. The standard finding is that attitudes about the legality and morality of abortion vary according to the *stage of pregnancy*, with support for abortion waning as the preborn human progressively develops. Gallup public opinion polls for more than two decades (from 1996 to 2020) have tracked American attitudes regarding abortion by trimester and have documented the following pattern: 60-66% of Americans think abortions in the first trimester should generally be legal but this support drops by more than half to 24-28% for abortions in the second trimester (after 12 weeks gestation), and drops further to 8-13% abortions in the third trimester (Saad 2018). The same pattern shows up among respondents who identify as "pro-choice" rather than "pro-life" (Saad 2011) and among respondents who identify as "Democrat" rather than "Republican" (Saad 2018). For instance, in 2011 Gallup reported that 89% of pro-choice Americans thought abortions should generally be legal in the first trimester but only 48% thought they should be legal in the second trimester (Saad 2011). In 2018 Gallup reported that 77% of Democrats thought abortions should generally be legal in the first trimester but only 46% thought they should be legal in the second trimester (Saad 2018). There also is no substantial

gender gap in the distribution of opinion: women and men in general hold similar abortion attitudes, though women are more likely than men to oppose abortions after 12 weeks gestation (Saad 2018). We find very similar attitudinal patterns in other Western countries, including countries with liberal abortion laws such as Canada and Great Britain (ComRes 2017).

Why does the distribution of opinion shift around 12 weeks gestation? Plausibly because there is widespread disagreement about personhood and rights at this stage and probably a few weeks earlier too. Consider three supporting considerations. First, respondents' attitudes about the legality of abortion (i.e. what the law should be) generally track their attitudes about the morality of abortion (Saad 2002). Second, widespread disagreement at an earlier gestational point is indicated by polls showing that around 40% of Americans support so-called fetal heartbeat bans that legally prohibit abortion once a fetal heartbeat can be detected, usually around 6 weeks of pregnancy (Saad 2019). Third, when respondents are asked more specific questions about whether abortion is "murder" or "as bad as killing a person who has already been born," a substantial proportion of respondents (ranging between 38% and 57%) respond affirmatively (Hunter and Bowman 1990; Saad 2002; Bowman 2012).

What is the evidential significance of widespread disagreement in society and among the relevant experts? It should lessen our confidence. This claim is common ground in the epistemology of disagreement (Christensen 2009). Return to our opening drone case. Suppose there was disagreement among the drone operators and other crew members about whether a little child was present in the kill zone. Suppose they were apparent epistemic peers with similar evidence. After discovering their disagreement, should they lessen their confidence? It seems so.

Consider another motivating case:

> *Math class:* Suppose you are taking a math class with 20 other students whom you know possess comparable intelligence and background knowledge. The instructor gives your class a fairly difficult math question. After a couple minutes, each student independently arrives at their own highly confident answer. The instructor asks for a show of hands, and you discover that 12 students arrived at your answer and 8 students arrived at another answer that is incompatible with yours but not clearly absurd. How should you respond to this disagreement?

You should become less confident of your own answer. Why? The natural explanation is that widespread disagreement among your classmates constitutes a good reason (though defeasible reason) to think you are missing something and have made a mistake. After all, you are fallible, this is a fairly difficult math question—it is not like whether 2+2=4—and the other side's answer is not obviously absurd. Perhaps you are missing something. Similarly, if there is widespread disagreement about preborn personhood in society and among those best positioned to determine it, then we should become less confident in our own view. After all, we are fallible, preborn personhood is a fairly difficult moral question—it's not like whether it's wrong to torture children for fun—and the other side's answer is not clearly absurd. Perhaps we are missing something.

4.3 *Problems with Theories of Personhood*

Despite our bad track record and widespread disagreement about whether preborn humans after 10 weeks are persons, confident deniers of their personhood could invoke arguments to justify their continued confidence. What could such arguments be? After all, standard arguments (e.g. natural miscarriage arguments, twinning arguments, embryo rescue cases) challenge the moral status of early human embryos, not preborn humans older than 10 weeks gestation. The main arguments available appeal to theories or criteria of personhood to justify excluding preborn humans after 10 weeks gestation. However, such confidence is misplaced because such theories are problematic.

Theories of moral personhood seek to explain what makes us persons by specifying necessary and jointly sufficient criteria or merely sufficient criteria. There is an extensive literature but we can identify three main theoretical approaches: *mental capacity accounts* emphasize mental capacities as necessary for personhood (Tooley 1983; McMahan 2003; Singer 2011; Giubilini and Minvera 2013), *relational accounts* emphasize relationships to certain individuals or groups as necessary for personhood (Sherwin 1991; Strong 1997; Lindemann 2014; Foster and Herring 2017), and *humanist accounts* emphasize our humanity as a sufficient condition for personhood (Mulhall 2002; Chappell 2011; Kaczor 2014; Kittay 2017).

There are two main problems with mental capacity accounts and relational accounts. First, these theories deny plain moral commonsense. Second, these theories lack the explanatory power necessary to override moral commonsense.

Jaworska and Tannenbaum (2019) observe that the mass public converges on the following view of moral personhood:

> *The Commonsense View*: Human infants and cognitively disabled humans (except perhaps those who have irreversibly lost consciousness) are persons and have a higher moral status than other animals (except perhaps sophisticated animals such as great apes).

Moral commonsense says it is presumptively wrong to kill human infants and cognitively disabled humans, for the same direct reason that it is wrong to kill the rest of us. Moreover, it's worse to kill them than to kill other animals. For instance, the harmful experiments performed on primates and other animals cannot permissibly be performed on human infants and cognitively disabled humans.

The Commonsense View is the prevailing view. Its widespread acceptance is reflected in academic scholarship, in the modern human rights movement, and in the laws of liberal democracies that attribute to all born human beings the same basic legal rights possessed by the rest of us. For example, the laws of liberal democracies attribute the rights of personhood to disabled human infants. Such laws supply evidence that strong majorities view infants and disabled humans as persons. With respect to this commonsense standard, mental capacity accounts and relational accounts are either too exclusive or too inclusive.

A theory is *too exclusive* if it excludes individuals from personhood who clearly count as persons along with the rest of us. Mental capacity accounts that ground personhood in sophisticated mental capacities such as self-consciousness or rational agency (or moral agency) will problematically exclude infants and a range of cognitively disabled humans without these capacities. However, the idea that newborn babies or cognitively disabled humans do not possess a serious right to life because they are not cognitively sophisticated enough would strike most people as morally repugnant (Kittay 2009; Rodger, Blackshaw, and Miller 2018).

Relational accounts that emphasize certain relationships to individuals (e.g. caring relationships) or groups (e.g. social recognition) as necessary for personhood will exclude humans who don't have such

relationships or who lose them. However, the idea that certain infants do not possess a serious right to life because they are unwanted by their parents or unrecognized by their society would strike most people as absurd and pernicious. Our personhood and moral rights surely do not depend on social convention and the shifting attitudes and feelings of other people, and it is a good thing that they don't. For instance, it is a good thing for female newborns and disabled children who have the bad luck of having parents who don't want them.

A theory is *too inclusive* if it includes as persons those individuals who clearly don't have the same moral status as the rest of us. To avoid being too exclusive some mental capacity accounts emphasize more rudimentary capacities such as the capacity to care (Jaworska and Tannenbaum 2014). But such accounts either remain too exclusive by excluding disabled humans without the selected rudimentary capacities or they risk becoming too inclusive, for some nonhuman animals possess capacities comparable to those of severely disabled humans (DeGrazia 2014). Do dogs and severely disabled humans possess equal moral worth? It strongly seems not. Relational accounts face the same problem when they emphasize more rudimentary relationships, which humans might have with other animals (e.g. pets). The idea that my grandfather with advanced Alzheimer's has the same moral status as my dog is repugnant, no matter how much I care about my dog.

In contrast, *humanist* accounts that accept our humanity as sufficient for personhood can avoid the problem of being too exclusive or too inclusive with respect to *The Commonsense View*. Humanist accounts can explain why human infants and cognitively disabled humans are persons. Of course, it could be argued that such accounts are too inclusive *if* they include human embryos (or early embryos). But the exclusion of embryos from personhood is not an item of moral commonsense: we find more disagreement about human embryos than we do about human infants and cognitively disabled humans. Thus, humanist accounts cohere better with moral commonsense. It is worth emphasizing that humanist explanations do not claim that humanity is *necessary* for personhood, only that it is *sufficient*. Thus, such explanations are perfectly compatible with the compelling view that nonhuman animals have significant moral status and that sophisticated nonhuman aliens (or animals) like us would be persons too. The "speciesism" objection alleges that our

human species membership does not determine our personhood any more than our race or sex. Humanist accounts do think there is something morally special about humans but they usually don't invoke mere species membership to explain it. Rather, we humans are persons because we share a common human nature (Beckwith 2007, Chapter 6), or because we are made in God's image (Kilner 2015), or because we have immortal souls, or because we are "human" understood in a thick normative sense as opposed to a descriptive biological sense (Mulhall 2002). Finally, it is worth observing that humanist accounts are not wedded to religious premises: we don't need to believe in God in order to believe that all humans are persons with rights (Greasley and Kaczor, 192-194).

Even if mental capacity accounts and relational accounts deny plain moral commonsense and have counterintuitive implications, it could still be rational to accept them if they possess an overriding explanatory power. Are these accounts powerful enough to override moral commonsense? It appears not. Consider mental capacity accounts. A successful mental capacities account must explain which capacities divide persons from nonpersons, the nature of these capacities, what it means to possess them, why their possession endows us with our great moral worth, and why we have equal moral worth if we possess these capacities to different degrees. And if such an account is to exclude preborn humans older than 10 weeks gestation, it must show that they do not possess the required mental capacities (e.g. sentience). Not only is there disagreement among mental capacity theorists but there is moral and/or empirical uncertainty at each step, as a review of the personhood literature confirms (Greasley and Kaczor 2018; Jaworska and Tannenbaum 2019).

For example, what explains our equal moral worth? If our mental capacities explain our moral worth as persons, and our mental capacities come in degrees, then why wouldn't our moral worth come in degrees too? Why wouldn't some of us with greater mental capacities have greater moral worth? Mental capacity theorists usually respond to this worry by claiming that once we meet a *threshold* on the capacity scale, greater degrees of the relevant capacity do not elevate our moral worth any further. But this theoretical maneuver seems like an *ad hoc* device designed to preserve moral equality, and it raises additional theoretical difficulties such as where the cognitive threshold should be set and why there rather than elsewhere (McMahan 2008).

In contrast, humanist accounts can explain our moral equality with comparative ease. The explanatory power of humanity is evidenced by the modern human rights movement, whose reformers have invoked our common humanity rather than our mental capacities or relationships to ground our equal human rights. Consider the Nazi T4 euthanasia program, which targeted and systematically killed disabled and unwanted humans. Deemed "unworthy of life" hundreds of thousands of disabled and unwanted infants, children, and adults were lethally injected or gassed with poison without their consent. These victims had great and equal moral worth. Why? Because they had the "right" mental capacities or the "right" relationships? A more straightforward explanation is *because they were human*.

Since mental capacity accounts and relational accounts conflict with moral commonsense and lack the explanatory power necessary to override it, confident denials of preborn personhood cannot rationally rest on confidence in these accounts.

4.4 *The Similarity Between Preborn Humans and Newborn Babies*

Even if we don't know the correct theory or criteria of personhood, we can still possess evidence that someone is a person. In our opening drone case, the drone pilots had evidence in the form of a grainy video feed that the unidentified organism wandering into the kill zone was a person. This evidence consisted of the overall physical and behavioral similarity of the organism to a small human child, who is a person.

Consider the evidence of baby-likeness: consider the fact that preborn humans older than 10 weeks possess a high degree of overall similarity to premature newborn babies, who are persons.

As we observed earlier, it is an item of moral commonsense that newborn babies are persons, including premature newborn babies, tens of thousands of whom are born every year in the United States. For instance, it would be homicide for me to go to the hospital and smother a premature baby born at 21 weeks, even if the baby be my own. It would be wrong to kill her for the same direct reason it is wrong to kill the rest of us: we have a serious right to life.

We also know empirically from the fetal sciences and ultrasound imaging that preborn humans older than 10 weeks gestation are highly similar to premature newborns, both physically and behaviorally,

both inside and out. Consider physical and behavioral characteristics that they share in common. According to standard embryology textbooks (Moore, Persaud, and Torchia 2020), both possess biological humanity, individual human bodies, a recognizably human physical appearance, a distinctive human face and human facial expressions, male or female sex organs, a heart and heartbeat, all the major organs and bodily systems (e.g. a nervous system), a human brain and human neuronal structures (which are incrementally developing), brain activity (e.g. EEG activity, unlike dead people), a skeleton with bones undergoing ossification, motor skills (e.g. purposeful limb movement), reflex movements (e.g. they respond to touch, grasp objects, swallow amniotic fluid, turn their heads toward sources of stimulation), physical stability (the miscarriage rate at 10 weeks gestation has dropped to less than 1%, Tong et al. 2008), and the natural potential for the development of distinctively human capacities (e.g. self-consciousness, rationality, moral agency, and so on).

What are the known differences between them? The premature newborn baby is older, larger, more mature, medically viable, and born. Do such differences clearly mark the boundary between moral personhood and non-personhood, between who is morally protected and who is not? It seems not.

Both viability and birth are problematic candidates. Viability is seldom defended anymore as a criterion of personhood. There is no good justification for it: your dependence on another person (or their body) for survival does not deprive you of your personhood and rights. For example, suppose a newborn baby is dependent on her mother's breastfeeding because her mother is the only one around or only one willing to feed her (Singer 2011, 27). Is this particular newborn baby a person like other newborns? Of course. For another example, consider conjoined twins. Some conjoined twins like Abby and Brittney Hensel (who are college graduates) are medically non-viable throughout their lives: they are physically dependent on their other twin's body for survival—separating them would kill them. But we know such twins are distinct persons, as they perceive themselves to be (Greasley and Kaczor 2018, 109).

The birth criterion has absurd implications. For instance, if birth divides persons from nonpersons, then a premature baby born at 21 weeks is a person worth neonatal care but the *very same baby* could be permissibly killed downstairs in the hospital's abortion clinic (Harris 2008, 77; McMahan 2013). The birth

criterion also implies that a premature baby born at 21 weeks is a person but a clearly conscious, much more developed, and twice as old baby still in the womb at 42 weeks (like one of my sons) is not yet a person. Such implications seem absurd.

But other than birth and medical viability, there appears to be no other known differences or developmental milestones between 10 weeks and 21 weeks that could cogently distinguish persons from nonpersons. (If humans have a soul, when does ensoulment happen?). Could fetal sentience or consciousness do the distinguishing trick (Steinbock 2011)? This won't work because we don't know yet when these mental capacities first emerge. There is substantial disagreement and uncertainty among fetal scientists (for a review of the literature, see Howsepian 2011).

For instance, Derbyshire and Bockmann (2020) recently reassessed the neurological and behavioral evidence and placed the earliest possible onset of fetal sentience at 12 weeks. Accordingly, they argue that we have moral reason to use fetal analgesia and anesthesia during abortions after 12 weeks gestation. Their empirical assessment is interesting because Derbyshire is one of the world's leading specialists on fetal pain and for decades prior to this point has been a confident advocate of a much later date, namely 24 weeks (Derbyshire 2010). Despite his very public pro-choice moral and political commitments, the current evidence has diminished his former confidence and driven him to draw the line much earlier at 12 weeks.

In addition to the shifting scientific disagreement, there are other reasons to be humble when assessing fetal sentience. Consider three reasons. First, the nature of sentience or consciousness is still unclear, especially fetal sentience. Second, the neural basis of consciousness is still unknown. Later estimates of fetal sentience depend on the claim that a functioning cerebral cortex is required for consciousness (Lee et al. 2005). But this claim is hotly contested among pain scientists, both with respect to adult humans and early humans (Howsepian 2011; Derybshire and Bockmann 2020).

Third, we have a notoriously bad track record of mistakenly denying the pain and consciousness of preborn humans, newborn babies, animals, and cognitively disabled humans such as the untold number of patients who have been mistakenly diagnosed as "vegetative" (Braddock 2017; 2021). For example, in the 1980s the conventional medical wisdom was that newborn babies and preborn humans could not feel pain:

their aversive responses to painful stimuli were just reflexes. Accordingly, surgeons did not supply them with anesthesia during surgery nor with painkillers afterwards. To be sure, paralytic drugs were used to immobilize them during surgery but no anesthesia was given to render them unconscious. That is, these hapless patients were fully conscious during surgery (e.g. open-heart surgery) but paralyzed and unable to express their pain! The medical community's justification for this practice was that the baby's nervous system (e.g. cerebral cortex) was not developed enough to feel pain and she won't remember it anyway. It was not until 1987 that the *American Academy of Pediatrics* deemed this practice unethical (Poland et al. 1987).

Today the sentience of newborns and preborn humans is accepted and precautionary measures are routinely taken to avoid causing them pain. For instance, preborn humans in the second and third trimesters are routinely given anesthesia during fetal surgery, though not during abortions (Bellieni 2020; Derbyshire and Bockmann 2020). The fact that we don't give preborn humans anesthesia (or pain relief) during abortion is deeply disturbing. Everyone agrees that preborn humans can feel pain by the third trimester i.e. after 24 weeks (Blickstein and Oppenheimer 2016). Regardless when fetal sentience first begins (at 12, 18, or 24 weeks), what this means is that millions of preborn humans have experienced their own slaughter in abortion. We don't know yet when fetal sentience first begins, but our bad track record suggests that any line drawn should err on the side of caution.

But suppose (hypothetically) that we discovered with certainty that fetal sentience first begins at some point well after 12 weeks gestation (e.g. at 20 weeks). Even so, it would still not cogently divide persons from nonpersons. For a sentience criterion has problematic implications. For example, some newborn babies are born in a comatose or vegetative state, but can gain the capacity for consciousness as a result of further development, brain plasticity, and/or therapeutic treatment (Ashwal 2004). If sentience divides persons from nonpersons, then such newborns would not be persons with rights until later *after* they gain consciousness. This is hard to believe. It seems wrong to use these newborn babies for organ harvesting and scientific experimentation, even if we do so *before* they gain consciousness.

Since viability, birth, and fetal sentience cannot do the distinguishing trick, the overall similarity between newborn babies and preborn humans older than 10 weeks constitutes evidence that these preborn

humans are persons too. And the evidence for their personhood only gets stronger as their development progresses and they become more and more similar to premature newborns.

4.5 *Gestational Age Miscalculations*

We must also take into account the uncertainty of gestational age ("weeks gestation"). How is gestational age calculated? Abortion law leaves the matter to the judgment of the individual abortion provider, using the method and algorithms of their choice (Erdman 2017, 32). The standard methods used for estimating gestational age are ultrasound and menstrual dating. However, these methods are routinely off track by 1 or 2 weeks for pregnancies around 10-12 weeks and can easily be further off. And the range of error increases as the pregnancy progresses. Such routine miscalculations happen for various reasons and there are many variables that affect accuracy, which are discussed in the medical literature (for a recent literature review, see Butt et al. 2014). What this means is that in the real world of current medical practice an abortion of a preborn human whose gestational age is *estimated* by an abortion provider to be 10 weeks could easily be an abortion of a preborn human whose *real* gestational age is 12 weeks or older. The uncertainty of gestational age should make us more uncertain about personhood around 10-12 weeks.

4.6 *The Common Intuitive Responses of Women*

We should also consider the common intuitive responses of women to their pregnancies and miscarriages. Ordinarily, women who experience pregnancy after 10 weeks gestation respond to their baby as a person rather than the moral equivalent of a garden plant or animal. For instance, they refer to their "child/baby" or "son/daughter," name them, love them, and care for them in countless ways (Canella 2005). Such affections and behaviors increase as gestation progresses, for example when the woman begins to feel fetal movement (which can occur as early as 13 weeks gestation). Newborn infants are subject to similar dignifying responses. Moreover, women who experience miscarriage after 10 weeks gestation tend to grieve and mourn the loss of their irreplaceable child in the way that we grieve the loss of newborns and other persons (Lok and Neugebauer 2007).

What should we do with such common intuitive responses? We should take them as evidence for preborn personhood that makes it more likely than it would otherwise be. Consider two motivations. First,

common intuitive responses count as (defeasible) evidence on any plausible moral epistemology of personhood. For instance, the fact that we intuitively respond to newborn infants and cognitively disabled humans as persons is evidence that they are in fact persons. Second, the common intuitive responses of women to their pregnancies and miscarriages cannot easily be explained away or dismissed. For instance, they cannot easily be dismissed as merely sentimental or confused or future-oriented. Such responses are also fairly common among women with pro-choice moral and political commitments, which indicates that they are not simply mediated or biased by one's prior commitments (Manninen 2010, 41-43; Roth 2018).

Of course, more could be said, and more evidence for preborn personhood could be provided. However, the evidence we have presented in this paper is enough to show that there is a substantial chance that preborn humans after 10 weeks are persons.

V. CONCLUSION: DON'T RISK HOMICIDE AND DON'T RISK TORTURE

Abortions are wrong after 10 weeks gestation because they substantially and unjustifiably risk homicide, the unjust killing of an innocent person. *The Don't Risk Homicide Argument* is cogent and makes progress in the abortion debate, for three reasons.

First, the argument bypasses the dialectical stalemate over preborn personhood. Jeff McMahan observes that "the main reason" why "abortion remains one of the most intractably controversial of all moral issues…is that the moral and metaphysical status of human embryos and fetuses is shrouded in darkness (2003, 3; also see Greasley 2017). But it's not necessary to establish personhood in order to establish the wrongness of abortion: a substantial chance (a more than 1 in 5 chance) of personhood is enough.

Second, our argument rests on common ground rather than contentious metaphysical premises or moral premises. Our evidence for personhood does not rest on a metaphysical theory of personal identity nor a humanist account of moral personhood. Our moral reasoning rests on intuitive moral principles rather than a contentious decision theory or ethical theory.

Third, our argument doesn't entail the wrongness of all abortions after 10 weeks gestation. Our argument allows for the permissibility of abortion when the mother is threatened with a staggering cost like

death. Double effect reasoning (or the doctrine of double effect) is the standard justification for making such exceptions: even if there is a 100% chance that preborn humans are innocent persons, it is permissible to cause their foreseen but unintended death when there is a proportionately serious reason for doing so, namely to save the mother's life (Kaczor 2014, 203-209).

Our paper strongly suggests that society must do more to protect preborn humans, in two respects.

First, we should not risk torturing them in abortions after 10 weeks gestation. Recall the chilling fact that no anesthesia (or pain relief) is provided to preborn humans during abortions. Everyone agrees that preborn humans can feel pain by the third trimester (after 24 weeks). What about earlier? Recall the assessment of Derbyshire and Bockmann (2020): the current neurological and behavioral evidence indicates that preborn humans could feel pain as early as 12 weeks gestation. This is morally relevant, they observe, because if preborn humans can feel pain at this stage then abortions would cause them pain.

To appreciate this ethical concern, we must consider how abortions are performed in the second trimester. The most common method used in the United States (in 96% of cases), England, and other developed countries is surgical dismemberment, or more formally "dilation and evacuation" or D&E (Lohr, Hayes, and Gemzell-Danielsson 2008). This method involves killing preborn humans by dismembering them limb by limb with grasping forceps, without pain relief. Death is due to blood loss. The other standard method of second trimester abortion is medical abortion or medical induction, which is common in India, China, some parts of Europe, and developing countries. Medical drugs are used to artificially induce strong labor contractions, which proceed to forcefully crush the preborn human: usually "a bruised, dead fetus" is delivered (Grossman, Blanchard, and Bluemthal 2008, 179). However, sometimes the baby is born alive. To prevent a live birth, some abortionists lethally inject the preborn human before inducing labor: a long needle is inserted through the woman's abdomen to inject lethal drugs (e.g. potassium chloride, digoxin) directly into the baby's heart, body, or amniotic fluid.

Derbyshire and Bockmann (2020) argue commonsensically that we have moral reason to give preborn humans anesthesia or analgesia before we dismember them, crush them, or lethally inject them: *don't needlessly risk causing them pain*. This moral reason is strengthened tremendously by the present paper.

Our evidence for preborn personhood shows that abortions after 12 weeks not only risk causing pain but also risk *torturing an innocent person*. (If researchers killed a newborn kitten or newborn baby by dismembering her or crushing her without pain relief, we would not hesitate to call it physical torture. Lethal injections can also cause severe pain, which is why we require anesthesia before their use in animal euthanasia and the death penalty). We should not risk the physical torture of an innocent person, unless we have overriding reason to do so. Supplying preborn humans with pain relief before killing them poses a relatively small medical risk for the mother and an added financial cost. Do such costs justify risking the torture of innocent people? It appears not, even if the chance of torture is low at 12 weeks gestation. (The chance increases substantially every week after 12 weeks). We legally require the humane killing of animals and mandate pain relief for animals used in potentially harmful research (Kluge 2015). So too we should mandate pain relief for preborn humans, who very well may be persons. Since gestational age miscalculations of ±2 weeks are common (see section 4.5), we should err on the side of caution and mandate fetal pain relief a couple weeks earlier than 12 weeks.

Finally, *The Don't Risk Homicide Argument* appears to have practical implications for social policy and abortion law. Worldwide more than ten million abortions are performed each year after 10 weeks gestation when the mother's life is not threatened (including 150,000+ abortions in the United States). We are usually told that such abortions only constitute a minority of abortions (around 20%). How is this supposed to be reassuring? There is a substantial chance that this is mass homicide. The moral risk that we are perpetuating mass homicide is disturbing because of the scale of the practice, the gravity of homicide, and our bad track record of treating vulnerable human persons as nonpersons. What should we as a society do in response? Should we legally prohibit abortions after 10 weeks gestation (when the mother's life is not threatened), as we legally prohibit other forms of reckless endangerment such as reckless driving, demolition, shooting, and warfare? After all, a major function of the law is to protect innocent persons from serious harm. Such protective legal measures could be accompanied by moderate legal penalties for abortion providers (George and Ponnuru 1996) and social policy measures (pro-woman, pro-childraising measures) designed to effectively minimize the cost faced by women in unwanted pregnancies (Camosy 2015, Chapter 6). Nothing

directly follows from our argument about whether abortions after 10 weeks should be illegal or criminalized, for additional considerations must be taken into account when determining these matters. But the legal and social policy implications deserve serious consideration given how much is at stake.[5]

NOTES

[1] On the concept of murder in ethics, see (Tännsjö 2015, Chapter 4). The concept of homicide in law usually refers to the unjustified killing of a person, but it can also refer to legally justified killing (e.g. in self-defense).
[2] For a brief but insightful consideration, see Beckwith (2007, 150-152).
[3] It is worth observing that a "meta-risk" argument could also be offered to confident defenders of The Good Samaritan Argument who are unfazed by the critical literature: there is a reasonable chance that The Good Samaritan Argument is flawed, hence we should not substantially risk homicide by performing or having an abortion after 10 weeks gestation. We could provide them with reasons to be skeptical about The Good Samaritan Argument—for example, reasons from peer disagreement.
[4] Other moral factors could amplify the wrongness of a particular homicide and thus strengthen the moral reason we have to not risk it. For instance, it is bad enough to substantially risk homicide but it is worse to do so when we ourselves are *responsible* for the situation where we must choose between risking homicide or facing a personal cost (Moller 2011). If the pregnant woman voluntarily chooses to have sexual intercourse and is partly responsible for creating this risky situation, this could strengthen the moral reason she has to not risk homicide by having an abortion after 10 weeks. The responsibility factor is important and can strengthen *The Don't Risk Homicide Argument*, but its discussion would make for too long of a paper (see Bernstein and Manata 2019).
[5] On the legal and policy implications of the moral risk presented by abortion, see Beckwith 2007, 30-31, 60-62; Friberg-Fernros 2017; Napier 2019, Chapter 6.

ACKNOWLEDGMENTS

My gratitude for comments on this material is due to Anne Braddock, Christopher M. Brown, Merry Brown, Jason Eberle, David Hershenov, A. A. Howsepian, Jonathan Matheson, Stephen Napier, Alexander Pruss, and two anonymous reviewers from this journal.

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